

LAW OFFICES  
**COHN AND MARKS LLP**

SUITE 300  
1920 N STREET N.W.  
WASHINGTON, D.C. 20036-1622

JOEL K. LEVY  
ROBERT B. JACOBI  
ROY R. RUSSO  
RONALD A. SIEGEL  
LAWRENCE N. COHN  
RICHARD A. HELMICK  
WAYNE COY, JR.  
J. BRIAN DE BOICE  
JEROLD L. JACOBS

SUSAN V. SACHS  
KEVIN M. GOLDBERG  
JOSEPH M. DI SCIPIO

TELEPHONE (202) 293-3860  
FACSIMILE (202) 293-4827  
HOMEPAGE WWW.COHNMARKS.COM

DIRECT DIAL: 202/452-4823  
INTERNET ADDRESS: [jj@cohnmarks.com](mailto:jj@cohnmarks.com)

May 15, 2002

VIA HAND DELIVERY

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Portals II, Filing Center, TW-A325  
Washington, D.C. 20554

RECEIVED

MAY 15 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: **MM Docket No. 89-120**  
**FM Table of Allotments**  
**(Northwye, Cuba, Waynesville, Lake Ozark and Eldon, MO)**

Dear Ms. Dortch

Enclosed herewith for filing, on behalf of our client, Lake Broadcasting, Inc., are an original and four (4) copies of its Petition for Reconsideration concerning the Commission's *Memorandum Opinion and Order*, FCC 02-100, released April 18, 2002, in the above-referenced matter.

Please direct all communications concerning this matter to the undersigned.

Very truly yours

  
Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (w/enc.)

No. of Copies rec'd  
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BEFORE THE

# Federal Communications Commission

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations  
(Northwye, Cuba, Waynesville,  
Lake Ozark and Eldon, Missouri)

(Brookline, Missouri)

(Ava, Branson and  
Mountain Grove, Missouri)

(Columbia, Bourbon, Leasburg,  
Gerald, Dixon and Cuba, Missouri)

MM Docket No. 89-120

MM Docket No. 90-195

MM Docket No. 91-352

MM Docket No. 92-214

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MAY 15 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

## PETITION FOR RECONSIDERATION

Lake Broadcasting, Inc. ("Lake"), licensee of Station KBMX(FM), Eldon, Missouri, by its attorneys, pursuant to Section 1.106 of the Commission's Rules, hereby seeks reconsideration of the Commission's *Memorandum Opinion and Order* ("MO&O II"), FCC 02-100, released April 18, 2002, in this proceeding.

1. MO&O II recognized that Lake's December 3, 2001 Application for Review herein challenged only that part of the Commission staff action in *Memorandum Opinion and Order* ("MO&O I"), 16 FCC Rcd 19423 (Allocations Br. 2001), that affirmed the former Mass Media Bureau's termination of the FM channel rulemaking proceeding in MM Docket No. 89-120. The Bureau concluded in MO&O I that the dismissal of Lake's previous petition for reconsideration as moot was not premature. In MO&O II (§5), the Commission denied Lake's Application for Review



and affirmed the termination of MM Docket No. 89-120, agreeing with the Bureau that dismissal of Lake's appeal in that proceeding was not premature. As Lake will now explain, *MO&O II* erroneously affirmed the Bureau, and MM Docket No. 89-120 should be reinstated.

2. Lake's Application for Review and *MO&O II* are "two ships passing in the night". On the one hand, Lake maintains that it is premature for the Commission to terminate MM Docket No. 89-120 because a pending appeal in the United States Court of Appeals for the District of Columbia Circuit (*Michael S. Rice v. FCC*, Case No. 01-1474, filed November 1, 2001) prevents a related license revocation proceeding against Michael S. Rice from becoming final, and because the technical upgrade that Lake is seeking in MM Docket No. 89-120 has a scientific and public interest legitimacy independent of whether Lake remains the licensee of Station KBMX (FM), Channel 270A, Eldon, Missouri.

3. On the other hand, *MO&O II* (§§'s 5 & 6) concludes: (a) the revocation of the license for Station KBMX "had already become final"; (b) Lake's D.C. Circuit appeal "is irrelevant because that filing did not change the fact that the license revocations were final"; and (c) since Lake's license for Station KBMX on Channel 270A has been revoked, "we will not upgrade the channel class". Lake will now demonstrate that all three conclusions are incorrect as a matter of law and should be reversed upon reconsideration.

4. Lake's Application for Review noted that its Notice of Appeal in Case No. 01-1474 was filed one day after *MO&O I* was adopted and one day before it was released. Thus, it is not surprising that *MO&O I* made no reference to Lake's court appeal. Therefore, Lake's Application for Review emphasized the relevance of the Notice of Appeal to MM Docket No. 89-120. Specifically, the Notice of Appeal challenges the Commission's actions in *Memorandum Opinion and Order* ("*MO&O III*"), 16 FCC Rcd 18394 (2001), concerning Lake's Petition for Equitable

Relief. That Petition requested, *inter alia*, that the Commission should hold a supplemental hearing and take such further actions as are necessary to afford Mr. Rice and the licensees of his five stations a full and fair opportunity to demonstrate their qualifications to hold all the broadcast authorizations and applications at issue in the Commission's tainted 1996 revocation hearing. *MO&O III* affirmed the denial of the Petition, and the Notice of Appeal challenges that action.

5. *MO&O II* (§§'s 4 & 5) references Case No. 01-1474, but it erroneously concludes that this appeal is "irrelevant because that filing did not change the fact that the license revocations were final". It attempts to bolster this view by quoting language from the Commission's *Memorandum Opinion and Order* ("*MO&O IV*"), 17 FCC Rcd 4111 (2002), which assertedly affirmed the Bureau's denial of Lake's Petition for Equitable Relief (see Paragraph 4 above), even though the Commission originally did so in *MO&O III*.

6. However, Lake filed a Notice of Appeal concerning *MO&O IV* on March 27, 2002 (Case No. 02-1103). By an April 9, 2002 Order (copy attached hereto), the Court of Appeals has consolidated this appeal with Case No. 01-1474, has established a briefing schedule, and has set the consolidated case for oral argument on Tuesday, February 25, 2003. A central issue to be decided by the Court in the consolidated appeal is whether, notwithstanding the policy favoring administrative finality, statutory and constitutional requirements of fairness and due process require that further proceedings be held with respect to the FCC's revocation of the Rice station licenses, due to the fundamentally tainted and unfair nature of the FCC's prior revocation hearing. The Commission's reliance in *MO&O II* on the asserted "finality" of the prior revocation determination is thus a prejudgment of the outcome of the court appeal. The FCC may believe that the Court should reject the appeal, and it may believe that the Court will eventually do so, but mere beliefs and predictions as to the outcome of the pending appeal are not



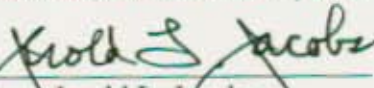
a sound basis for a current ruling in this related matter. Rather than issue a ruling that is based solely on the FCC's prejudgment of how the Court should or will rule, the FCC should hold this collateral proceeding in abeyance, make its arguments to the Court at the appropriate time, and then await the Court's decision.

WHEREFORE, in view of the foregoing, Lake respectfully asks the Commission to reconsider and reverse *MO&O II*, reinstate Lake's Petition for Reconsideration, and hold the MM Docket No. 89-120 proceeding in abeyance, pending the outcome of judicial review in Case Nos. 01-1474 and 02-1103 and any further proceedings that the Court may order pertaining to Station KBMX.

Respectfully submitted,

LAKE BROADCASTING, INC.

By

  
Jerold L. Jacobs  
J. Brian DeBoice

Cohn and Marks LLP  
1920 N Street, N.W. Suite 300  
Washington, D.C. 20036  
(202) 293-3860

Its Attorneys

Dated: May 15, 2002

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1474

September Term, 2001

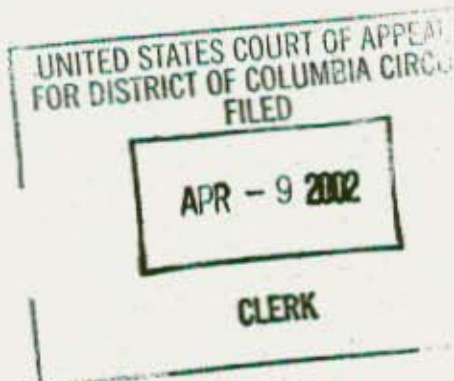
Michael S. Rice, et al.,  
Appellants

v.

Federal Communications Commission,  
Appellee

Consolidated with 02-1103

Filed On:



ORDER

This case has been scheduled for oral argument on Tuesday, February 25, 2003 at 9:30 AM before Chief Judge Ginsburg and Circuit Judges Sentelle and Randolph. The time and date of oral argument will not change absent further order of the Court.

It is **ORDERED**, on the court's own motion, that a briefing schedule be established as follows:

Appellant's Brief	Wed, Oct 23 2002
Appellee's Brief	Fri, Nov 22 2002
Appellant's Reply Brief	Fri, Dec 6 2002
Deferred Appendix	Fri, Dec 13 2002
Final Briefs	Fri, Dec 27 2002
Oral Argument	Tue, Feb 25 2003

Because the briefing schedule is keyed to the date of argument, the Court will grant requests for extension of time limits for briefs or transcripts only for extraordinarily compelling reasons.

Parties are strongly encouraged to hand deliver their briefs to the clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must utilize the most expeditious form of delivery. See Fed.R.App.Proc. 25(a). Briefs should be in final form. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(7).

A further order of the Court will be issued regarding the allocation of time for argument.

FOR THE COURT:

Mark J. Langer, Clerk

BY:

*Cheri Carter*

Cheri Carter  
Deputy Clerk

**CERTIFICATE OF SERVICE**

I, Maryam B. Jeffrey, hereby certify that I have mailed, first class postage prepaid, or have caused to be hand-delivered, on this 15th day of May, 2002, a copy of the attached PETITION FOR RECONSIDERATION to the following:

Peter H. Doyle, Chief (HAND DELIVERY)  
Audio Division  
Media Bureau Room 2-A360  
Federal Communications Commission  
Washington, DC 20554

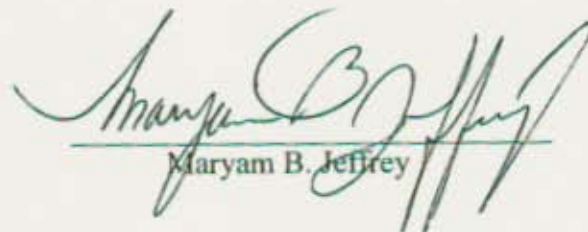
John A. Karousos, Assistant Chief (HAND DELIVERY)  
Audio Division  
Media Bureau Room 3-A266  
Federal Communications Commission  
Washington, DC 20554

Daniel M. Armstrong, Associate General Counsel (HAND DELIVERY)  
Office of the General Counsel, Litigation Division  
Federal Communications Commission Room 8-A-766  
Washington, D.C. 20554

David D. Oxenford, Esq.  
Martin R. Leader, Esq.  
ShawPittman  
2300 N Street, N.W.  
Washington, D.C. 20037-1128  
**Counsel for CTC Communications, Inc.**

Howard A. Topel, Esq.  
Leventhal Senter & Lerman, P.L.L.C.  
2000 K Street, N.W., Suite 600  
Washington, DC 20006-1809  
**Counsel for Herrin Broadcasting, Inc. and  
Reichel Broadcasting Corporation**

Mr. Al Germond  
Columbia FM, Inc. (KARO(FM))  
503 Old 63 North  
Columbia, Missouri 65201

  
Maryam B. Jeffrey